**United States Bankruptcy Court**
**Central District of California**
**Santa Ana**
**Theodor Albert, Presiding**
**Courtroom 5B Calendar**

**Thursday, June 9, 2022** **Hearing Room 5B**

10:00 AM
**8:00-00000** **Chapter**

**#0.00** **Hearings on this calendar will be conducted using ZoomGov video and audio.**

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**Video/audio web address:**
https://cacb.zoomgov.com/j/1605997676

**ZoomGov meeting number:** 160 599 7676

**Password:** 203644

**Telephone conference lines:** 1 (669) 254 5252 or 1 (646) 828 7666

10:00 AM
**CONT...** **Chapter**

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- Connect early so that you have time to check in.
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- Say your name every time you speak.
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# United States Bankruptcy Court
# Central District of California
## Santa Ana
## Theodor Albert, Presiding
## Courtroom 5B Calendar

**Thursday, June 9, 2022** **Hearing Room 5B**

10:00 AM
**CONT...** **Chapter**

Docket 0

**Tentative Ruling:**

- NONE LISTED -

10:00 AM
**8:18-12541 Scott Lawrence Chappell** **Chapter 7**
Adv#: 8:18-01174 Chappell et al v. Chappell et al

**#1.00** CONT'D STATUS CONFERENCE Hearing RE: Adversary Complaint To:
1. Determine Non-Dischargeability Of Debt Pursuant To Section 523(a)(2), and (a)(6);
2. Objection To Discharge Pursuant to 11 U.S.C. Section 727(a)(2) and (a)(4)
(Complaint filed 9/12/18)
**(cont'd from 4-20-22 Wallace Cal)**
**(cont'd from 4-28-22 per court's own mtn - passing of the gavel)**

FR: 12-12-18; 5-8-19; 9-18-19; 3-11-20; 7-8-20; 11-18-20; 4-7-21; 10-27-21

Docket 1

**Tentative Ruling:**

Tentative for 6/9/22:
Continue to June 29, 2022 @ 10:00AM to allow for documentation of and authorization for settlement.

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**APPEARANCES REQUIRED**.

The Court will issue the following scheduling order:

All discovery shall close on November 30, 2021.

All discovery motions shall be heard before December 31, 2021.

All pretrial motions (except motions in limine) shall be heard before January 31, 2022.

Pretrial conference is set for February 9, 2022 at 9 a.m.

10:00 AM
**CONT... Scott Lawrence Chappell** **Chapter 7**
COURT TO PREPARE ORDER.

**Party Information**

**Debtor(s):**

| | |
|---|---|
| Scott Lawrence Chappell | Represented By<br>Stephen E Olear |

**Defendant(s):**

| | |
|---|---|
| Scott Lawrence Chappell | Represented By<br>Stephen E Olear |
| Alicia Woolsey | Represented By<br>Stephen E Olear |

**Joint Debtor(s):**

| | |
|---|---|
| Alicia Woolsey | Represented By<br>Stephen E Olear |

**Plaintiff(s):**

| | |
|---|---|
| William Chappell | Represented By<br>Stephen A Madoni |
| Russell Chappell | Represented By<br>Stephen A Madoni |

**Trustee(s):**

| | |
|---|---|
| Thomas H Casey (TR) | Represented By<br>Thomas H Casey |

# United States Bankruptcy Court
# Central District of California
## Santa Ana
## Theodor Albert, Presiding
## Courtroom 5B Calendar

**Thursday, June 9, 2022** **Hearing Room 5B**

10:00 AM

**8:19-10158 BP Fisher Law Group, LLP** **Chapter 11**

Adv#: 8:19-01066 BP Fisher Law Group, LLP v. SELECT PORTFOLIO SERVICING, INC.

**#2.00** STATUS CONFERENCE RE: Complaint For (1) Breach Of Contract; (2) Open Book Account; (3) Quantum Meruit

**(cont'd from 4-07-22 per order approving stipulation to continue s/c entered 3-23-22)**

Docket 1

***** VACATED *** REASON: CONTINUED TO 8-04-22 AT 10:00 PER ORDER APPROVING STIPULATION TO CONTINUE STATUS CONFERENCE ENTERED 5-17-22**

**Tentative Ruling:**

Tentative for 4/8/21:
Status? This matter has been continued several times.

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Tentative for 6/27/19:
Why no status report?

**Party Information**

**Debtor(s):**

BP Fisher Law Group, LLP — Represented By Marc C Forsythe

**Defendant(s):**

SELECT PORTFOLIO — Pro Se

**Plaintiff(s):**

BP Fisher Law Group, LLP — Represented By Benjamin Cutchshaw

10:00 AM
**8:19-12273 Eric Douglas Ford** **Chapter 7**
Adv#: 8:21-01029 Kosmala v. Ford

**#3.00** STATUS CONFERENCE RE: Complaint: (1) To Avoid Fraudulent Transfer Pursuant To 11 U.S.C. § 548(a)(1)(A); (2) To Avoid Fraudulent Transfer Pursuant To 11 U.S.C. § 544(b) And CAL. CIV. CODE § 3439.04(a)(1); (3) To Avoid Fraudulent Transfer Pursuant To 11 U.S.C. § 548(a)(1)(B); (4) To Avoid Fraudulent Transfer Pursuant To 11 U.S.C. § 544(b) AND CAL. CIV CODE §§ 3439.04(a)(2) And 3439.05(a); (5) For Recovery Of Avoided Transfer Pursuant To 11 U.S.C. § 550; (6) To Preserve Transfer For The Benefit Of The Estate Pursuant To 11 U.S.C. § 551; (7) For Authorization To Sell Real Property In Which Co-Owner Holds Interest Pursuant To 11 U.S.C. § 363(h); (8) For Turnover Of Property Of The Estate Pursuant To 11 U.S.C. § 542; And (9) For Authorization To Pay Costs Of Sale Pursuant To 11 U.S.C. § 363(j)
**(cont'd from 4-07-22 per order approving stip. to cont. status hearing entered 3-22-22)**

Docket 1
***** VACATED *** REASON: CONTINUED TO 8-25-22 AT 10:00 A.M. PER ORDER APPROVING STIPULATION TO CONTINUE STATUS HEARING ENTERED 5-23-22**

**Tentative Ruling:**

Tentative for 8/26/21:
Continue status conference about 120 days. Send to mediation, which is to occur within that period. Status Conference continued to: January 6, 2022.

Appearance: required

**Party Information**

**Debtor(s):**

Eric Douglas Ford — Represented By J Scott Williams

**Defendant(s):**

Joan Riley Ford — Pro Se

# United States Bankruptcy Court
# Central District of California
## Santa Ana
## Theodor Albert, Presiding
## Courtroom 5B Calendar

**Thursday, June 9, 2022** **Hearing Room 5B**

10:00 AM

**CONT... Eric Douglas Ford** **Chapter 7**

**Plaintiff(s):**

Weneta M.A. Kosmala — Represented By Jeffrey I Golden

**Trustee(s):**

Weneta M.A. Kosmala (TR) — Represented By Erin P Moriarty

10:00 AM
**8:10-26382 Fariborz Wosoughkia** **Chapter 7**
Adv#: 8:20-01028 Marshack v. Rowshan et al

**#4.00** PRE-TRIAL CONFERENCE RE: Complaint for: 1) Avoidance of Unauthorized Post-Petition Transfer (11 USC Section 549); 2) Recovery of Avoided Transfers (11 USC Section 550); 3) Turnover of Property of the Estate; 4) Quiet Title to Real Property and 5) Injunctive Relief
**(set from s/c hrg held 6-24-21)**
**(cont'd from 4-07-22 per order continuing pre-trial conference entered 4-04-22 )**

Docket 1

**Tentative Ruling:**

Tentative for 6/9/22:
Set trial date according to parties' schedules.

Appearance: required

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Tentative for 1/6/22:
Continue approximately 90 days.

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Tentative for 6/24/21:
Deadline for completing discovery: November 1, 2021
Last date for filing pre-trial motions: December 10, 2021
Pre-trial conference on: December 23, 2021 @ 10:00AM
Joint pre-trial order due per local rules.

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Tentative for 12/10/20:
Status conference continued to: June 24, 2021 @ 10:00 a.m.
Deadline for completing discovery: June 1, 2021

10:00 AM

**CONT... Fariborz Wosoughkia** **Chapter 7**

Last date for filing pre-trial motions: June 11, 2021
Pre-trial conference on:
Joint pre-trial order due per local rules.

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Tentative for 6/3/20:
See #8 and 9 @11:00 a.m.

**Party Information**

**Debtor(s):**

| | |
|---|---|
| Fariborz Wosoughkia | Represented By<br>Carlos F Negrete - INACTIVE - |

**Defendant(s):**

| | |
|---|---|
| Hamid Rowshan | Pro Se |
| Fariborz Wosoughkia | Pro Se |
| Natasha Wosoughkia | Pro Se |
| WELLS FARGO BANK | Pro Se |

**Joint Debtor(s):**

| | |
|---|---|
| Natasha Wosoughkia | Represented By<br>Carlos F Negrete - INACTIVE - |

**Plaintiff(s):**

| | |
|---|---|
| Richard A Marshack | Represented By<br>Michael G Spector |

**Trustee(s):**

| | |
|---|---|
| Richard A Marshack (TR) | Pro Se |

10:00 AM
**8:21-12507 DCM-P3, LLC** **Chapter 11**

**#4.10** Debtor's Motion To: (1) Approve Sale of Real Property Free and Clear of All Liens, Interests, Claims and Encumbrances with Such Liens, Interests, Claims, and Encumbrances to Attach to Proceeds Pursuant to 11 U.S.C. §§ 363(b) and (f); (2) Approve Overbid Procedures; (3) Determine That Buyer is Entitled to Protection Pursuant to 11 U.S.C. § 363(m); and (4) Provide Related Relief **(cont'd from 6-08-22)**

Docket 88

**Tentative Ruling:**

Tentative for 6/9/22:
Status?

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Tentative for 6/8/22:
See #5.

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Tentative for 6/1/22:

This is debtor DCM-P3, LLC's ("Debtor") motion to: (1) Approve sale of real property free and clear of all liens, interests, claims and encumbrances with such liens, interests, claims, and encumbrances to attach to proceeds pursuant to 11 U.S.C. §§ 363(b) and (f); (2) Approve overbid procedures; (3) determine that buyer is entitled to protection pursuant to 11 U.S.C. § 363(m); and (4) Provide related relief. The motion is opposed by creditors Verde Investments, Inc. ("Verde"), GF Capital and Albert Lissoy. Senior secured creditor Axos Bank ("Axos") filed a separate response to the motion.

1. Background

On October 14, 2021 (the "Petition Date"), the Debtor and affiliated debtor Sarina Browndorf ("Ms. Browndorf" and collectively with DCM-P3, the "Debtors") each filed voluntary petitions for relief under chapter 11 of the

10:00 AM

**CONT... DCM-P3, LLC** **Chapter 11**

Bankruptcy Code. Ms. Browndorf's bankruptcy case is pending before this Court as Bankr. Case No. 8:21-bk-12506-TA. DCM-P3 is a community property entity of Ms. Browndorf and her estranged non-debtor husband, Matthew Browndorf ("Mr. Browndorf"). The Debtor manages its financial affairs pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee, examiner, or committee has been appointed in either of the Debtors' chapter 11 cases. Debtor is a Delaware entity that was formed in 2015 to hold title to the Property. The Debtor is a disregarded entity for tax purposes, and it does not have any income. The Debtor did not have any bank accounts prepetition, and to the best of Ms. Browndorf's knowledge, the Browndorfs paid the Debtor's obligations, including expenses related to the Property.

Prepetition, on June 16, 2021, Ms. Browndorf filed a dissolution of marriage petition in the Superior Court of the State of California, County of Orange, commencing Case No. 21D003789 (the "Dissolution Action"), which is currently pending and is active and contentious. As of the Petition Date, the family court had not divided assets and liabilities between Browndorfs.

Shortly after the filing of the Dissolution Action, Mr. Browndorf filed an ex parte application with the family court and obtained a temporary restraining order prohibiting Ms. Browndorf from entering the Property, and temporarily giving him full custody of their minor child. Ms. Browndorf successfully opposed the ex parte application and restraining order, which the family court vacated. Thereafter, Ms. Browndorf filed her own motion with the family court seeking a restraining order against Mr. Browndorf. On September 22, 2021, the family court entered a permanent restraining order against Mr. Browndorf for three years. The permanent restraining order also gave Ms. Browndorf sole use of the Property. On October 19, 2021, the family court entered an order granting Ms. Browndorf exclusive management and control of DCM-P3.

At all times during the Browndorf's marriage, Mr. Browndorf was in control of the Browndorfs' finances. Pre-petition, Mr. Browndorf allowed the Property to go into foreclosure, and a foreclosure sale was scheduled for October 18, 2021. However, the Debtors' bankruptcy filings stayed the sale. While Ms. Browndorf placed the Debtor into bankruptcy, Mr. Browndorf has allegedly refused to turn over most books and records or information regarding management of the entity and regarding his communications with

10:00 AM

**CONT... DCM-P3, LLC** **Chapter 11**

the lienholders on the Property. Despite this fact, Ms. Browndorf asserts that she has received sufficient information to contest multiple purported liens against the Property.

There is only one "purchase money mortgage" on the Property, and that was in the approximate amount of $2,800,000 as of the Petition Date as shown in the Debtor's schedules. Mr. Browndorf has allegedly voluntarily encumbered the Property with millions of dollars of disputed liens – even though the borrower(s) under the respective promissory notes are other community property entities and, Debtor argues, there is no evidence that the Debtor ever received any benefit from these encumbrances. For example, Debtor asserts, community property entity Distressed Capital Management, LLC ("DCM") is the borrower under a loan agreement (the "Verde Note") in favor of Verde and community property entity DCM-P1, LLC ("DCM-P1") is another guarantor; therefore, Debtor argues, they are equally liable for payment of amounts due and owing under the Verde Note.

On January 10, 2022, Verde filed its Motion for Relief from the Automatic Stay Under 11 U.S.C. § 362 (Real Property) seeking relief from the automatic stay to pursue its rights under state law as to the Property pursuant to Sections 362(d)(1) and (d)(2) of the Bankruptcy Code. On April 13, 2022, the Court granted the RFS Motion with the relief provided for in the order taking effect on June 6, 2022.

The property was extensively marketed. On March 23, 2022, the Buyer offered to purchase the Property for $5,500,000. On March 30, 2022, the Debtor submitted a counteroffer to Buyer in the amount of $5,900,000, which was accepted by Buyer. On or around April 5, 2022, the Debtor accepted an offer for $6,000,000 from a different potential buyer, however, the potential buyer declined to proceed with the sale during the due diligence period. After the sale to the first buyer fell through, on April 20, 2022, the Debtor accepted the Buyer's offer for $5,900,000, which was the best and highest offer for the Property at the time. Subsequently, after the Buyer conducted its due diligence, the parties agreed to a reduction of the sale price to $5,700,000 based on certain costs of deferred maintenance on the Property.

The proposed distributions for sale proceeds are contemplated as

10:00 AM
**CONT... DCM-P3, LLC** **Chapter 11**

follows:

1. Unpaid real property taxes due for the 2021-2022 tax years in the approximate amount of $28,801.29;

2. A deed of trust in favor of Mortgages Electronic Registrations Systems, Inc., as beneficiary, as nominee for BOFI Federal Bank, in the principal amount of $2,795,000, recorded on June 26, 2015, which was subsequently assigned to Axos Bank by assignment recorded on July 9, 2020 (the "First Trust Deed").

3. A deed of trust in favor of Michael K. Boone Living Trust and Nancy D. Nashu Living Trust in the amount of $850,000, recorded on August 8, 2016, which was subsequently assigned to GF Capital Group by assignment recorded on October 24, 2019 (the "GF Capital Trust Deed").

4. A deed of trust in favor of Verde in the amount of $2,400,000 recorded on November 7, 2016 (the "Verde Trust Deed").

5. A deed of trust in favor of Albert Lissoy in the amount of $2,255,287 recorded on November 8, 2019 (the "Lissoy Trust Deed").

2. Legal Standards

Section 363(b) provides that after notice and a hearing, a trustee may sell property of the estate out of the ordinary course of business. Courts have held that in order to approve a sale, a court must find that the trustee demonstrates a valid business justification, and that the sale is in the best interest of the estate. *In re 240 North Brand Partners, Ltd.*, 200 B.R. 653 (9th Cir. BAP 1996); *In re Wilde Horse Enterprises, Inc.*, 136 B.R. 830, 841-42 (Bankr. C.D. Cal. 1991). A sale is in the best interest of the estate when it is fair and reasonable, it has been given adequate marketing, it has been advertised and negotiated in good faith, the purchaser is proceeding in good faith, and it is an arm's length transaction. *Wilde Horse Enterprises*, 136 B.R. at 841. The *Wilde Horse* court goes on to explain that good faith encompasses fair value and further speaks to the integrity of the transaction. Bad faith would include collusion between the seller and buyer or any attempt to take unfair advantage of any potential purchasers. *Id*. at 842. The opponents do not raise any serious question about the good faith of the

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**CONT... DCM-P3, LLC** **Chapter 11**

transaction, but more to the question of whether liens are in "bona fide dispute" within the meaning of §363(f)(4).

3. Should The Sale Be Approved Under §363(f?)

As noted, the motion faces significant opposition. The senior secured creditor, Axos, will apparently be paid in full from proceeds of the sale, but the other secured creditors may not. Verde, a secured creditor with a third position claim argues that the sale provides no benefit to anyone except Sarina Browndorf (who has apparently been living at the Property rent free during this bankruptcy), and the estate's professionals. Furthermore, Verde argues that there is no actual basis for disputing Verde's lien on the Property and the adversary proceeding purporting to dispute the lien is merely a pretext to support the sale motion under §363(f)(4). Next, Verde argues that it is undisputed that the Debtor served as a guarantor of the loan made by Verde to Debtor's affiliate, Distressed Capital Management, LLC ("Borrower"), and it is well-settled that property pledged by a guarantor and encumbered to secure repayment of another is valid and enforceable (assuming the underlying obligation is legitimate). Debtor's claim that Verde's lien is "fraudulent" is not supported by law or fact. Specifically, Verde argues that the loan transaction of which Debtor complains would require this Court to review and second guess the orders of two other Federal Courts. In particular, the loan transaction was allegedly entered into pursuant to a FRBP 9019 order entered by the United States Bankruptcy Court for the District of Arizona, wherein that Court approved the very Loan Documents that Debtor now challenges, and specifically found that the parties "negotiated and entered into the Settlement Agreement ... in good faith, and it was the product of arms' length, non-collusive negotiations." Moreover, Verde argues, the United States District Court for the District of Arizona has likewise entered judgment against Sarina Browndorf on the very Loan Documents that Ms. Browndorf now contests in this court. Therefore, Verde argues, there is no bona fide dispute as to the validity or the enforceability of the Loan Documents. Verde also argues that the request to extend the RFS Order should be denied because (i) a Notice of Sale has not been recorded and, therefore, a foreclosure sale cannot proceed before the scheduled closing date; (ii) the Court has already granted relief from stay pursuant to Code sections 362(d)(1) and (d)(2), and Debtor has not demonstrated cause for an alternation of

10:00 AM

**CONT... DCM-P3, LLC** **Chapter 11**

that Order; and (iii) delaying the effectiveness of the RFS Order does not benefit the Debtor or the estate; to the contrary, it only benefits Ms. Browndorf. Finally, Verde argues, if the sale is approved over Verde's opposition, Verde is entitled to adequate protection payments.

Creditors GF Capital and Lissoy opposed the motion on several similar grounds. These creditors argue that the bankruptcy was only filed to stave off a foreclosure by GF Capital and no one but Sarina Browndorf has benefitted by the "bad faith" filing. GF Capital raises concerns that Debtor's counsel might have a conflict as counsel represents both the owner of the Property (Debtor) and the occupant (Sarina) who has been living at the Property rent free while no payments have been made to any secured creditors. GF Capital and Lissoy also note that Debtor was supposed to have filed a plan and disclosure statement by March 30, 2022, but that has not occurred. Like Verde, GF Capital and Lissoy assert that the adversary proceedings purporting to dispute the secured liens are merely pretext for the sale motion, but GF Capital and Lissoy argue that no one is presently discharging the duties of care owed to creditors like GF Capital and Lissoy. Finally, GF Capital and Lissoy argue that none of the applicable subsections in §363(f) apply here. These creditors do not consent to the sale, the Property is massively over encumbered and the proposed sale price would not cover payment to junior secured lienholders, and as discussed above, the liens of junior creditors are not in bona fide dispute. Thus, these creditors argue, the motion should be denied.

4. What to Do?

These are certainly troubling allegations and aspects that the court does not view lightly. The timing of the adversary proceedings is certainly suspicious, but the merits of those adversary proceedings are not currently before the court. It seems beyond doubt that the sale will not generate sufficient funds to pay all secured creditors, which would obviously leave nothing for unsecured creditors unless the junior secured liens are invalidated or substantially reduced. But in order for that to happen, Debtor would have to either prevail in the adversary proceedings or obtain a favorable settlement. But the Code does not seem to require that a disputed lien be removed via judgment, before a sale, only that the court find the dispute to be bona fide. The court does not know what Debtor's realistic prospects are for such

10:00 AM

**CONT... DCM-P3, LLC** **Chapter 11**

outcomes. What also appears undisputed is that the primary beneficiary of both the bankruptcy filing and the proposed sale will be Sarina Browndorf, who is also a chapter 11 debtor herself, and it is not clear what, if anything, remains to be done in this case after sale of the primary if not sole asset. That in turn may be a function as to how viable the adversary proceedings turn out to be. The court is also troubled to hear that during the pendency of this case, secured creditors have not been paid, and so Ms. Browndorf has been effectively occupying a multi-million dollar mansion for months rent- free. The court is also not happy that no plan is on file in this case (something was filed in the Browndorf case?) despite a deadline and any prospects in this case seem very distant on this record. The court notes that a motion to extend the deadline to file a plan is on calendar for June 22.

5. Continue?

The court notes that Verde (joined by GF Capital and Lissoy) filed a motion to dismiss the adversary proceedings filed by Debtor. The motion to dismiss is on calendar for June 8, just a week after this motion is set for hearing. As the court reads it, this sale motion is heavily dependent on a finding that the junior creditors' secured liens are in bona fide dispute, but on this very thin record the court is unable to judge the bona fides of these disputes. Debtor and Ms. Browndorf argue that it is unclear that debtor got any value at all in return for massive encumbrance of its sole asset. But does that suffice to dispute a loan guaranteed by Debtor and an encumbrance agreed to lawfully? What effect or weight should be given to the reported review of the transaction(s) by another court? Those questions seem very unclear. If the motion to dismiss is successful, that could open the door for the other consequences as well. On the other hand, if the motion to dismiss fails, depending on how developed is the record, that could be enough to find that disputes are indeed bona fide. The sale itself at $5.7 million does not seem out of line or lacking in adequate marketing, and the price seems within the range of reasonable. But on this record the court is left unconvinced on the predicates of a sale free of liens under §363(f)(4), but that could change once the motions to dismiss are heard and that record considered. On the question of adequate protection raised by the junior lienholders, the only thing that needs protection is the secured portion of a claim, which under these numbers seems to be a lot smaller than the full amount, and depending on who is asking, maybe zero.

10:00 AM
**CONT... DCM-P3, LLC** **Chapter 11**

Continue to June 14 @ 10:00 a.m.

Appearance: required

**Party Information**

**Debtor(s):**

DCM-P3, LLC

Represented By
Susan K Seflin
Steven T Gubner
Jessica L Bagdanov

10:00 AM
**8:21-12507 DCM-P3, LLC** **Chapter 11**

**#4.20** Motion to Dismiss Pursuant to 11 U.S.C. 1112(b) Or, In The Alternative, To Remove Debtor-In-Possession
**(cont'd from 6-08-22)**

Docket 100

**Tentative Ruling:**

Tentative for 6/9/22:
See #4.1

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Tentative for 6/8/22:
Of course this requested dismissal needs to be considered in light of the $5.7 million offer that has been urged by the debtor.

Problem 1: This seems like a market price or reasonably close for the Black Hawk property, but it would apparently not pay off all of the liens. This is a problem since the total of liens is over $12.5 million. Only the first, second, and possibly some of the third lien of Verde stands to get anything out of escrow. Of course the junior liens could consent to the sale but no one seems inclined to do so.

Problem no. 2: Verde's motion for relief of stay was granted and the extended effective date of June 6 has now passed, so with Verde no longer constrained by the automatic stay the future and viability of this offer is unclear. The court is aware that the debtor has filed a motion to reimpose the stay (or to extend the stay) for hearing June 22, but this may be too little too late, and probably does not fix the other problems discussed below.

Problem No. 3: for the sale order to be free of liens under §363(f)(4) the questioned liens have to be in bona fide dispute, but thus far the debtor has not shown any substantial basis for such a finding. The only attempt at this argument was an oblique reference to the liens having been arranged by Mr. Browndorf but with proceeds not accounted for. But if Mr. Browndorf was the

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**CONT... DCM-P3, LLC** **Chapter 11**

duly authorized officer of the corporation(s) arranging the transaction(s) it is not clear to the court that this makes the lien(s) in bona fide dispute. At best it makes the recipients fraudulent conveyance transferees. So, this brings us around to the continuing purpose of this case as a chapter 11 reorganization. While adversary proceedings are underway it is not clear why a Chapter 7 trustee could/should not prosecute those to the extent they have net value. The court is not really seeing it, but will hear argument.

No tentative.

Appearance: required

**Party Information**

**Debtor(s):**

DCM-P3, LLC

Represented By
Susan K Seflin
Steven T Gubner
Jessica L Bagdanov
Jessica Wellington

11:00 AM
**8:20-11795 Byron York Priestley** **Chapter 7**
Adv#: 8:20-01159 Priestley v. 20 CAP FUND I, LLC et al

**#5.00** Motion to Continue Scheduling Order Deadlines

Docket 95

**Tentative Ruling:**

Tentative for 6/9/22:

This is debtor/plaintiff, Byron York Priestley's ("Debtor" or "Plaintiff") motion to continue scheduling order deadlines pursuant to Fed. R. Civ. P. 16(b)(4). The motion is opposed by defendants 20 Cap Fund I, LLC; FCI Lender Services, Inc.; Lars E. Bell; Corey O'Brien ("Defendants"). This case was inherited from Judge Wallace.

The operative Scheduling Order is from August 3, 2021. The chart below sets forth the current deadlines and the proposed new deadlines:

Discovery Deadline:
**Current:** June 30, 2022;
**Proposed:** October 20, 2022

Discovery Motion Deadline to Have Motions Heard:
**Current:** July 31, 2022;
**Proposed:** November 30, 2022

Pre Trial Motions Deadline to have Motions Heard:
**Current:** August 31, 2022;
**Proposed:** December 30, 2022

Pretrial Conference:
**Current:** September 14, 2022;
**Proposed:** February 15, 2023

Updated Status Report:

11:00 AM

**CONT... Byron York Priestley** **Chapter 7**

**Current:** August 31, 2022;
**Proposed:** February 1, 2023

1. Legal Standards

Pursuant to Rule 16(b) of the Federal Rules of Civil Procedure, the Court has broad discretion to set and modify the deadlines in its Scheduling Order. "A schedule may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). a party seeking to amend "must satisfy the 'good cause' standard of Federal Rule of Civil Procedure 16(b)(4)" ("Rule 16") before amendment will be permitted. *Neidermeyer v. Caldwell*, 718 F. App'x 485, 488 (9th Cir. 2017) (quoting *In re W. States Wholesale Nat. Gas Antitrust Litig.*, 715 F.3d 716, 737 (9th Cir. 2013)), petition for cert. filed, (U.S. Feb. 27, 2018) (No. 17-1490); *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-08 (9th Cir. 1992). Pursuant to Rule 16, a scheduling order "may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). While the court may consider the "existence or degree of prejudice" to the opposing party, the focus of the court's inquiry is upon the moving party's explanation. Id. "The pretrial schedule may be modified if it cannot reasonably be met despite the diligence of the party seeking the extension." *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir.2002) (quoting *Johnson*, 975 F.2d at 609). "The district court is given broad discretion in supervising the pretrial phase of litigation, and its decisions regarding the preclusive effect of a pretrial order ... will not be disturbed unless they evidence a clear abuse of discretion." *Miller v. Safeco Title Ins. Co.*, 758 F.2d 364, 369 (9th Cir. 1985); *Almazni v. United Financial Casualty Co.*, 5:14-cv-00975-CAS(ASx), at *1 (C.D. Cal. Jan. 7, 2015).

2. Brief Background

Plaintiff originally filed his Chapter 11 Petition on June 23, 2020. At that time, he was the Debtor-In-Possession and was legally able to administer the assets in his bankruptcy estate. Plaintiff filed this adversary proceeding on November 5, 2020. He obtained conversion of the underlying bankruptcy matter to Chapter 7 on November 25, 2020. As this Adversary Proceeding, per the original complaint, addressed issues pertaining to post-petition violations of the automatic stay regarding pre-petition real property, it was arguably property of the estate, or property to which the Chapter 7 Trustee could lay claim. No action was taken in this matter until such time as an

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**CONT... Byron York Priestley** **Chapter 7**

agreement between the Debtor and the Trustee could be struck regarding the prosecution of this matter. On May 21, 2021, the court entered an order in the Bankruptcy Case approving a compromise with the Debtor and allowing for continued prosecution of this matter. On September 29, 2021, Plaintiff moved to amend the complaint. The order allowing this amended was entered on November 3, 2021. The original complaint was limited to a claim for violation of the automatic stay, with the Amended Complaint adding claims for Declaratory Relief, Quiet Title, Wrongful Foreclosure, RICO, violation of the Federal Debt Collection Practices Act, violations of the Rosenthal Act, and pursuant to 11 U.S.C. §544(a) Turnover of the Debtors residence from Creditor 20 Cap, alleged to have violated the automatic stay and wrongfully foreclosed. The expanded First Amended Complaint also named six new defendants. According to Plaintiff, the gravamen of the First Amended Complaint is that the foreclosing entities, Defendant 20 CAP Fund I, LLC, and their agents FCI Lending Services and California TD specialist, do not have any lawfully assigned beneficial interest in the Debtor's Second Deed of Trust and Promissory Note that secured a $135,000 loan in 2004. Plaintiff alleges that 20 CAP's chain of title came from Santander Bank, who signed a void assignment and blank allonge in 2016 notwithstanding that in 2007 Santander Bank, then known as Sovereign, divested its entire interest and owned no part of the Priestley debt in 2016.

3. Should The Scheduling Order Be Modified?

Debtor argues the motion should be granted because there is still much discovery that needs to take place, but has encountered obstructions from 20 Cap. Plaintiff asserts that Despite communications with all witnesses' counsel, of the six properly noticed Rule 45 depositions, only one has occurred and that deposition is not completed as record searches continue. Plaintiff also asserts that the other Rule 45 subpoenas have been obstructed, with no production and pages of objections. Debtor opines that each witnesses' counsel has apparently conspired with 20 CAP's counsel to delay the depositions and obstruct discovery production based on 20 CAP's pending 9011 motion.

Plaintiff argues that the discovery he seeks is necessary for him to oppose the 9011 motion, and for him to establish the claims in the First Amended Complaint. Plaintiff asserts that each witness he seeks to depose

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**CONT... Byron York Priestley** **Chapter 7**

participated in creating, selling or signing documents in the 20 CAP chain of title to facilitate assignments from parties that had no ownership or authority to sign. If the claims in the First Amended Complaint can be proven, 20 Cap's liens will be avoided. Plaintiff asserts that he has been diligent in seeking all of this material discovery but cannot reasonably expect to complete it under the current deadlines. Because each of the witnesses are out of state, Debtor asserts, objections to the Rule 45 subpoena for deposition or records have to be litigated in the district where each witness lives. Debtor explains that, currently, one hearing is pending in Connecticut District Court, and based on the alleged obstruction, voluminous objections, and lack of any witnesses' attorney resolving any issues despite weeks of meet and confer efforts, each Rule 45 Subpoena will have to be litigated in New York, Florida and Connecticut. Therefore, Plaintiff argues, the request for 120 days is based on the time anticipated to obtain rulings, obtain the ESI searches results, and complete the depositions with the documents. Plaintiff argues that based on the obstructive conduct displayed by 20 Cap, good cause for extending the scheduling order has been shown.

In opposition, Defendants argue that the motion should not be granted because they will be prejudiced by the delay. Specifically, it would force Defendants to participate in extensive discovery proceedings that simply have no bearing on this case since the subject matter for which Plaintiff seeks additional discovery is barred by res judicata/collateral estoppel. As a result, Defendants argue, affording Plaintiff additional time to conduct such discovery will effectively force Defendants into participating into costly discovery proceedings that are inconsequential to the outcome of this case. Defendants' FRBP 9011 motion is based on judicially noticeable facts, evidencing that these very same legal theories and issues were—or could have been—adjudicated in two prior cases: one in California state court and one in this Federal Court. No discovery is needed to rebut that legal argument; indeed, no amount of discovery will nullify the existence or effect of the judicially noticeable documents upon which Defendants' motion and collateral estoppel argument is based.

Defendants would have this court make summary rulings based on alleged res judicata arguments in a motion to extend deadlines. This is likely procedurally improper (a Rule 56 or possibly a Rule 12 motion seems like the

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**CONT... Byron York Priestley** **Chapter 7**

more appropriate vehicle for Defendants' arguments). Judge Wallace heard many of these arguments before in Plaintiff's contested Motion For Leave To File Its First Amended Complaint. In granting the motion, Judge Wallace noted in his adopted tentative ruling from October 20, 2021 that "Discovery has barely commenced, and the case is in its early stages." This court has also recently been made aware of these arguments in the opposition to Plaintiff's second motion to continue the hearing on Defendants' motion for sanctions. The court granted that motion and continued the hearing to July 28, 2022. In its order, this court stated:

"The court has reviewed the opposition to the motion for continuance. Defendant makes what appears to be a case based on collateral estoppel and related theories. However, the court must weigh in the balance the interest in reaching a correct determination on the weighty question of sanctions, not just a speedy one. So, every reasonable doubt should be explored and plaintiff ought to have a reasonable opportunity to make this case that such doubt exists. But he must also realize that he has now used up all grace to be extended, and will have to either make his case, or not, within this final extension absent extraordinary circumstances. It should go without saying, however, that any attempt by Defendants to encourage noncooperation from witnesses will be counterproductive."

For purposes of this motion, Defendants' more compelling argument is that Plaintiff has not been diligent in pursuing discovery. Defendants asserts that this case has been pending for approximately 18 months and only very recently (March 2022) did Plaintiff conduct any third party discovery. Defendants note that even after the operative Scheduling Order was issued in August of 2021, Plaintiff waited another 7 months to conduct discovery. Defendants assert that these delays have yet to be explained.

In reply, Plaintiff argues that his First Amended Complaint was filed in late November of 2021 and in the intervening time, Plaintiff has diligently pursued discovery despite 20 Cap's resistance. At present, Plaintiff asserts that he has set the deposition of Kelly Coughlin, a witness to the instrument forging events, for June 1, 2022. Plaintiff asserts that he is meeting and conferring to obtain documents sought by subpoenas from four witnesses, Rothenberg, Carnivale, CAMG and Kraus and it appears because of the

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**CONT... Byron York Priestley** **Chapter 7**

voluminous objections, motions in Connecticut, Rhode Island and Florida will be required. Plaintiff argues that time is needed to finish those hearings. Thus, Plaintiff argues, he has been far from idle in his discovery efforts.

Plaintiff has made a sufficient case that at least some extension is warranted. Defendants should be mindful that the court expects cooperation with all reasonable discovery requests. Given the new and likely final deadlines in this adversary proceeding, delaying tactics will not be looked upon favorably by this court.

Appearance: required

**Party Information**

**Debtor(s):**

| | |
|---|---|
| Byron York Priestley | Represented By<br>Anerio V Altman |

**Defendant(s):**

| | |
|---|---|
| 20 CAP FUND I, LLC | Represented By<br>Andrew Mase<br>Timothy M Ryan<br>Michael W Stoltzman Jr |
| FCI Lender Services, Inc. | Represented By<br>Timothy M Ryan<br>Michael W Stoltzman Jr<br>Andrew Mase |
| BANK OF AMERICA NATIONAL | Represented By<br>Adam N Barasch |
| Bill Wolfson | Pro Se |
| NATIONSTAR MORTGAGE LLC | Pro Se |
| Corey O'Brien | Represented By<br>Timothy M Ryan<br>Michael W Stoltzman Jr |

# United States Bankruptcy Court
# Central District of California
## Santa Ana
## Theodor Albert, Presiding
## Courtroom 5B Calendar

**Thursday, June 9, 2022** **Hearing Room 5B**

11:00 AM

**CONT... Byron York Priestley** **Chapter 7**

Andrew Mase

Lars E Bell — Represented By
Timothy M Ryan
Michael W Stoltzman Jr
Andrew Mase

**Plaintiff(s):**

Byron York Priestley — Represented By
Anerio V Altman
Douglas L Mahaffey

**Trustee(s):**

Richard A Marshack (TR) — Represented By
Misty A Perry Isaacson

# United States Bankruptcy Court
# Central District of California
## Santa Ana
## Theodor Albert, Presiding
## Courtroom 5B Calendar

**Thursday, June 9, 2022** **Hearing Room 5B**

11:00 AM

**8:19-12480 Guy S. Griffithe** **Chapter 7**

Adv#: 8:19-01199 Samec v. Guy Griffithe Et.Al

**#6.00** Debtor's Motion To Enforce Settlement, Debtor's Motion To Dismiss The Complaint Pursuant To 7012(b)(6) And Debtor's Motion To Strike Certain Causes Of Action Pursuant To 7012(f)

Docket 129

**Tentative Ruling:**

Tentative for 6/9/22:
A serious charge has been made that the court was offered a fraudulent document, whose authenticity is challenged. Since this document is rather essential to the case, and the alleged conduct is very serious, a continuance to July 28, 2022 is granted. Briefing should track the limits set forth in the LBRs.

Appearance: Waived.

**Party Information**

**Debtor(s):**

| | |
|---|---|
| Guy S. Griffithe | Represented By<br>Bert Briones |

**Defendant(s):**

| | |
|---|---|
| Guy Griffithe Et.Al | Represented By<br>Anerio V Altman |

**Plaintiff(s):**

| | |
|---|---|
| Joseph Samec | Represented By<br>Michael Jay Berger |

**Trustee(s):**

| | |
|---|---|
| Thomas H Casey (TR) | Pro Se |

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**8:20-10477 Serenity Oak Farms, LLC** **Chapter 7**
Adv#: 8:22-01013 Golden v. PARTRIDGE et al

**#7.00** Motion to Dismiss Complaint Under FRCP 12(b)(6)

**[Michael D'Alba Appearing In Person]**
**[Laila Masud Appearing In Person]**

Docket 20

**Tentative Ruling:**

Tentative for 6/9/22:

This is the motion of defendants Cassondra Louise Partridge individually and as Trustee of the Judith A. Partridge Revocable Trust u/d/t October 3, 2002 ("Cassondra") and Camden John Partridge, an individual, ("Camden" and collectively with Cassondra "Defendants") to dismiss the First Amended Complaint ("FAC") filed by the chapter 7 trustee, Jeffrey Golden ("Trustee") pursuant to Fed. R. Civ. P. 12(b)(6). Trustee opposes the motion.

1. Background

The factual allegations as set forth in the FAC are as follows: The debtor, Serenity Oak Farms, LLC ("Debtor") owned the parcel of real property commonly known as 40500 Avenida La Cresta, Murrieta, California (the "Murrieta Property"). On or about May 5, 2017, the Debtor sold the Murrieta Property to a third party. The net sale proceeds from the Debtor's sale of the Murrieta Property were in the amount of $1,273,936.47. On or about May 8, 2017, the escrow company that handled the sale of the Murrieta Property transferred the amount of $1,273,936.47, to the client trust account of the Law Offices of James N. Knight at Wells Fargo Bank (the "Trust Account"). James N. Knight was at all relevant times the agent for service of process for the Debtor.

On or about May 9, 2017, the amount of $749,970.00, was transferred from the Trust Account to an account in the name of Judith A. Partridge, Trustee of the Judith A. Partridge Revocable Trust dated October 3, 2002, at Charles Schwab ending in 1593. On or about May 9, 2017, the amount of $523,891.47, was transferred from the Trust Account to an account in the

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**CONT... Serenity Oak Farms, LLC** **Chapter 7**

name of Judith A. Partridge, Trustee of the Judith A. Partridge Revocable Trust dated October 3, 2002, at Charles Schwab ending in 1426. The transfers from the Trust Account of the amounts of $749,970.00, and $523,891.47, to the accounts at Charles Schwab ending in 1593 and 1426, respectively, on or about May 9, 2017, are collectively referred to as the "Schwab Transfers." Plaintiff alleges that funds in the amount of the Schwab Transfers remain on hand in accounts at Charles Schwab in the name of the Partridge Trust.

Pursuant to the instrument by which the Partridge Trust was created, the Partridge Trust became irrevocable after Judith died. Plaintiff alleges that the beneficiaries of the Partridge Trust are now known with certainty. Cassondra and Camden are the beneficiaries of the Partridge Trust, and Plaintiff alleges that there are no other beneficiaries. The rights of Cassondra as a beneficiary of the Partridge Trust are fully vested. The rights of Camden as a beneficiary of the Partridge Trust are fully vested. Cassondra will receive a distribution from the Partridge Trust. Camden will receive a distribution from the Partridge Trust. The distributions that Cassondra and Camden will collectively receive from the Partridge Trust will include funds in an amount that is equal to the amount of the Schwab Transfers or more.

Plaintiff alleges that there exists in this case one or more creditors holding unsecured claims that are allowable under § 502 of the Bankruptcy Code or that are not allowable only under § 502(e) of the Bankruptcy Code, which could have avoided the Schwab Transfers under applicable law. Plaintiff conducted a reasonable investigation into the subject matter of this complaint, but the Debtor and/or the Partridge Trust, among other things, delayed the disclosure of information and documents to Plaintiff; refused to provide certain documents, at all, and only did so after issuance of process; were instructed not to answer questions that sought information and documents relevant to Plaintiff's investigation; took inconsistent positions as to those authorized to testify and produce information and documents for the Debtor; and did not produce the Partridge Trust instrument until the eve of the expiration of the period set forth by section 546(a) of the Bankruptcy Code.

2. The Claims

Based on the above allegations, Trustee asserts 17 causes of action:

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**CONT... Serenity Oak Farms, LLC** **Chapter 7**

1) To Avoid and Recover Voidable Transfer under 11 U.S.C. § 544(b) and California Civil Code § 3439.04(a)(1) – against the Partridge Trust, Cassondra and Camden;

2) To Avoid and Recover Voidable Transfer under 11 U.S.C. § 544(b) and California Civil Code § 3439.04(a)(2)(A)– against the Partridge Trust, Cassondra and Camden;

3) To Avoid and Recover Voidable Transfer under 11 U.S.C. § 544(b) and California Civil Code § 3439.04(a)(2)(B) – against the Partridge Trust, Cassondra and Camden;

4) To Avoid and Recover Voidable Transfer under 11 U.S.C. § 544(b) and California Civil Code § 3439.05– against the Partridge Trust, Cassondra and Camden;

5) To Recover Voidable Transfer under 11 U.S.C. §§ 544(b) and 550, and California Civil Code § 3439.08(b)– against Cassondra and Camden only;

6) To Recover Voidable Transfer under 11 U.S.C. §§ 544(b) and 550, and California Civil Code §
3439.08(b) – against Cassondra and Camden only;

7) To Recover Voidable Transfer under 11 U.S.C. §§ 544(b) and 550, and California Civil Code § 3439.08(b) – against Cassondra and Camden only;

8) To Recover Voidable Transfer under 11 U.S.C. §§ 544(b) and 550, and California Civil Code § 3439.08(b) – against Cassondra and Camden only;

9) To Avoid and Recover Voidable Transfer under 11 U.S.C. § 544(b) and California Civil Code § 3439.04(a)(1) – against Cassondra and Camden only;

10) To Avoid and Recover Voidable Transfer under 11 U.S.C. § 544(b) and California Civil Code § 3439.04(a)(2)(A) – against Cassondra and Camden;

11) To Avoid and Recover Voidable Transfer under 11 U.S.C. § 544(b) and California Civil Code § 3439.04(a)(2)(B)– against Cassondra and Camden;

12) To Avoid and Recover Voidable Transfer under 11 U.S.C. § 544(b) and California Civil Code § 3439.05– against Cassondra and Camden;

13) For Turnover under 11 U.S.C. § 542 – against the Partridge Trust only;

14) For Turnover under 11 U.S.C. § 542 – against Cassondra and Camden only;

15) To Decree a Resulting Trust under Applicable Law – against the Partridge Trust;

16) To Decree a Resulting Trust under Applicable Law – against Cassondra and Camden;

17) To Impose a Constructive Trust under Applicable Law – against the Partridge Trust.

3. Motion To Dismiss Standards

FRCP 12(b)(6) requires a court to consider whether a complaint fails to state a claim upon which relief may be granted. When considering a motion under FRCP 12(b)(6), a court takes all the allegations of material fact as true and construes them in the light most favorable to the nonmoving party. *Parks School of Business v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). A complaint should not be dismissed unless a plaintiff could prove no set of facts in support of his claim that would entitle him to relief. *Id*. Motions to dismiss are viewed with disfavor in the federal courts because of the basic precept that the primary objective of the law is to obtain a determination of the merits of a claim. *Rennie & Laughlin, Inc. v. Chrysler Corporation*, 242 F.2d 208, 213 (9th Cir. 1957). There are cases that justify, or compel, granting a motion to dismiss. The line between totally unmeritorious claims and others must be carved out case by case by the judgment of trial judges, and that judgment should be exercised cautiously on such a motion. *Id*.

FRCP 8 requires a pleading that sets forth a claim for relief to contain a short and plain statement of the claim showing that the pleader is entitled to relief. It is not necessary at the pleading stage to plead evidentiary detail, but

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facts must be alleged to sufficiently apprise the defendant of the complaint against him. *Kubick v. F.D.I.C. (In re Kubick)*, 171 B.R. 658, 660 (9th Cir. BAP 1994). Clarification, greater particularity, and other refinements in pleading are accomplished through motions, discovery, pretrial orders, and liberal toleration of amendments. *Yadidi v. Herzlich (In re Yadidi*), 274 B.R. 843, 849 (9th Cir. BAP 2002).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-556, 127 S. Ct. 1955, 1964-65 (2007). A complaint must contain sufficient factual matter to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662 129 S. Ct. 1937, 1949 (2009) citing Twombly. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id*. The plausibility standard asks for more than a sheer possibility that a defendant has acted unlawfully. *Id*. The tenet that a court must accept as true all factual allegations is not applicable to legal conclusions. *Id*. Threadbare recitals of elements supported by conclusory statements are not sufficient. *Id*.

4. Are The Claims Time-Barred?

The main issue in the motion is whether the complaint was filed beyond the time limits set forth in Cal. Civ. P. §366.2, and therefore, as a matter of law, cannot state a claim upon which relief can be granted. The defendants also argue that the claims against the beneficiaries fail to allege any "transfer" in that no distributions have ever been made to them by the Trust. As alleged in the complaint and amended complaint, Debtor transferred funds to the decedent and those funds have not been further transferred to anyone including the beneficiaries of the Trust. While there is some argument that a revocable trust under California law is indistinct from the decedent, Judith Partridge, that might not be true upon her death, or at least that is not what the instrument provides. While transfer is not entirely clear, somehow the money got moved to the Partridge Trust.

Section 544(b) provides that a trustee "may avoid any transfer of an

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interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 …" 11 U.S.C. §544(b). Under Section 544, Defendants argue that a Trustee may only assert the rights of an actual creditor which can challenge a particular transfer. *Kelley v. Opportunity Fin., LLC (In re Petters Co., Inc.,)* 561 B.R. 738, 746 (Bankr. D. Minn. 2016) (citation omitted) ("Section 544(b) empowers a trustee to step into the shoes of an actual unsecured creditor and utilize whatever state or non-bankruptcy federal law remedies that particular creditor may have."). Thus, Defendants assert, if creditors' claims are barred by an applicable state law statute of limitations, then a Trustee is similarly barred.

Here, Defendants assert, almost all claims alleged – aside from those under 11 U.S.C. § 542 - arise under California law and specifically: California Civil Code§3439.04(a)(1), (a)(2)(A), and (a)(2)(B), §3439.05, and 3439.08(b). Defendants argue that although the claims alleged are based on California law, they were filed after expiration of the applicable California statute of limitations. Specifically, Defendants assert, California Code of Civil Procedure ("CCP") § 366.2 mandates that claims against a decedent must be brought within one year after a decedent's death. If creditors with state law claims are prohibited from filing suit beyond the one-year period found in CCP § 366.2, and Trustee is now stepping into their shoes to assert those claims, Defendants argue, then Trustee is likewise barred. CCP §366.2 states in pertinent part:

> If a person against whom an action may be brought on a liability of the person, whether arising in contract, tort, or otherwise, and whether accrued or not accrued, dies before the expiration of the applicable limitations period, and the cause of action survives, an action may be commenced within one year after the date of death, and the limitations period that would have been applicable does not apply.

Moreover, Defendants argue, CCP § 366.2(a) applies to the time a creditor has to file a claim against a trust as well. In other words, Defendants argue, citing *Dacey v. Taraday*, 196 Cal.App.4th 962, 983 (2011), § 366.2(a) will bar an action when the breach or misconduct occurs before the

decedent's death and even where the claim is not discovered while the decedent is alive.

Defendants argue that CCP §366.2 applies where the action could have been brought on a "liability of the person." Here, Defendants argue, the Amended Complaint alleges facts to support fraudulent transfer claims against Judith related to transfers from Debtor to her – whether individually or in her capacity as trustee of her then revocable trust – that occurred in May 2017, prior to her death on March 2, 2020. Thus, Defendants argue, the one-year statute of limitations applies to claims against the decedent, Judith, subject to the COVID-19 tolling period of 178 days. Code Civ. Proc. § 366.2; Cal. Rules Ct., Emergency Rule 9(a). Judith passed away on March 2, 2020, therefore, Defendants argue, any fraudulent transfer claim was required to have been filed by August 27, 2021. But Trustee did not initiate the adversary proceeding until February 11, 2022. The FAC was not filed until April 6, 2022.

But the main question is whether 11 U.S.C. §546 governs over the otherwise applicable but inconsistent state law, or asked differently, does bankruptcy law preempt on this question? There is also a question of whether the fraudulent conveyance theories advanced by the Trustee are the sort of " liability of the person" discussed in §366.2. These are not easy questions and there does not appear to be Ninth Circuit law directly on point, but there are two unpublished cases analyzed below and other law from both this and other jurisdictions going both directions.

Section 546 states in pertinent part:

(a)An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of—
(1)the later of—
(A)2 years after the entry of the order for relief; or
(B)1 year after the appointment or election of the first trustee under section 702, 1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or
(2)the time the case is closed or dismissed.

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Defendants argue that the plain language of the statute is that an action "may not be commenced after two years" leaving the door open to the argument that some other limitations period may provide less time – like CCP §366.2. Defendants argue, citing *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981), as a matter of policy, that there is a presumption that Congress did not intend to displace state law. Defendants assert that the Ninth Circuit has acknowledged that there appear to be four distinct types of preemption:

(1) Congress may preempt state law by so stating in express terms;

(2) Congress's intent to preempt all state law in a particular area may be inferred where the scheme of federal regulation is comprehensive;

(3) Congress's intent to preempt a whole field may be inferred if the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject; and

(4) Compliance with both federal and state regulations is physically impossible. *See*, *Radici v. Associated Ins. Cos*., 217 F.3d 737, 741 (9th Cir. 2000) (internal citations omitted).

Defendants argue the express language of Section 546 fails to demonstrate a desire by Congress for the bankruptcy code to preempt state law when it comes to the after-life affairs of a decedent. Nor does there exist a comprehensive scheme of federal regulation when it comes to probate/wills and trusts. Therefore, Defendants argue, the issue narrows to whether state law conflicts with federal law in a manner that requires preemption. In this case, Defendants argue, there was no conflict between the state and federal laws since compliance with both statutes was possible. Thus, Defendants argue, Trustee had had approximately 18 months after the commencement of this bankruptcy case (and approximately 17 months after he learned of Mrs. Partridge's death), to file his action. Defendants argue that the BAP generally agrees with Defendants' policy approach. See, *Rund v. Bank of Am.Corp. (In re EPD Inv. Co., LLC*) 523 B.R. 680, 692 (9th Cir. BAP 2015) ("[i]n cases like *Phar-Mo*r, which involve state probate statutes, we agree that because Congress has not expressed an intention to override a state's strong and traditional interest in regulating probate matters, the [Bankruptcy] Code may

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not control." *Id*. at 691.) But *Rund* ended up holding that on the facts of that case §546 did preempt on the question of whether a statute of repose for 7 years on found at Cal. Civ. Code §3439.09(c) governing fraudulent conveyances was superseded in favor of the trustee's full two years. So the *Rund* court's discussion of a possible probate exception was *dicta*.

Defendants next point to a recent Central District unpublished opinion by Judge Tighe dismissing a chapter 7 trustee's fraudulent transfer action when it was filed within Section 546's limitations period but after expiration of the one-year time limit set forth in CCP § 366.2. See, *In re Lee*, Adv. Case No. 1:20-ap-01066-MT, Dk. No. 27, entered on January 19, 2021. See Defendant's Request For Judicial Notice Exhibit 2. In *Lee*, Judge Tighe articulated the policy behind CCP §366.2 as follows:

> "The Legislature enacted the predecessor of section 366.2, former section 535, in 1990… recommending enactment of the one year-from-death limitations period, the 1990 California Law Revision Commission (Commission) "explained . . . that such a statute would effectuate the strong public policies of expeditious estate administration and security of title for distributees, . . . is an appropriate period to afford repose, and provides a reasonable cutoff for claims that soon would become stale…
>
> (1) In estate administration, all debts are ordinarily paid. Even under the existing four-month claim period it is unusual for an unpaid creditor problem to arise. A year is usually sufficient time for all debts to come to light. Thus it is sound public policy to limit potential liability to a year; this will avoid delay and procedural complication of every probate proceeding for the rare claim that might arise more than a year after the decedent's death. (2) The one year limitation period would not apply to special classes of debts where public policy favors extended enforceability. These classes are (i) secured obligations, (ii) tax claims, and (iii) liabilities covered by insurance. The rare claim that may become a problem more than a year after the decedent's death is likely to fall into one of these classes. (3) Every jurisdiction of which the Commission is aware that has considered the due process problem addressed by the recommendation, including the Uniform Probate

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Code, has adopted the one-year statute of limitations as part of its solution. In sum, a general limitation period longer than one year would burden all probate proceedings for little gain. The one-year limitation period is a reasonable accommodation of interests and is widely accepted." *Lee* at 4:5-18.

In ultimately dismissing the trustee's action as time barred under § 366.2, Judge Tighe relied heavily on another unpublished opinion from the Middle District of Florida *Kapila v. Belotti (In re Pearlman)*, 2012 Bankr. LEXIS 2858 (Bankr. M.D. FL. 2012). In *Pearlman*, a family trust was the recipient of an allegedly fraudulent transfer. *Id*. at *5-6. The *Pearlman* trustee sued the trust and its beneficiaries. *Id*. Unfortunately, during the pendency of the case, the last beneficiary of the trust passed away and the trustee failed to file a claim in any of the beneficiaries' probate estates within the one-year time frame found in CCP § 366.2(a). *Id*. The defendant filed a motion to dismiss the trustee's complaint pursuant to CCP § 366.2(a). In granting the motion to dismiss, the *Pearlman* court stated:

> "Under certain circumstances, such as lack of notice of a defendant's death, a creditor may apply to file a late claim. But, under no circumstances may a creditor file a claim later than one year after the death of a defendant, as indicated in California Code of Civil Procedure § 366.2(a). Section 366.2 was enacted to bar claims against a probate estate after one year 'in order to provide closure, certainty, and protect a decedent's estate from stale claims of a creditor.' The one-year limitations period also enables the expeditious administration of probate estates. *Id*. at *9.

As noted by Judge Tighe in *Lee*, while the underlying issue in *Pearlman* was one of notice, the *Pearlman* court applying CCP § 366.2 granted the motion to dismiss in favor of the defendant despite the defendants being merely recipients of a fraudulent transfer. *In re Lee* at p. 4. Here, it is uncontested that neither Cassondra nor Camden have received distributions from the trust (yet) despite their interests having already vested. Trustee acknowledges this, but argues both of them will someday receive a distribution. This observation does not really assist Trustee's position. In a situation such as this, would Trustee's avoidance powers be interminable so

long as there was at least one trust beneficiary with vested rights who had not yet taken a distribution from a trust? The court does not understand the point of this observation. But there is also a question not discussed in the briefs which may have some relevance. Is it true that the Partridge Trust continued to exist after the death of Judith? It seems so under the instrument's language. So, as a possible defendant doesn't it qualify as a "subsequent transferee" with the meaning of 11 U.S.C. §550(a)(2)?

A rather large part of Trustee's opposition relies on *Estate of Yool*, 151 Cal. App. 4th 867 (2007). Trustee makes several of the same arguments advanced before Judge Tighe, that were ultimately found unpersuasive. Defendants urge this court to follow Judge Tighe's analysis in distinguishing the facts in *Yoo*l from *Lee* (and by extension, our facts). Judge Tighe analyzed not only the holding of *Yool*, but also discussed cases which had sought to articulate the borders of *Yool*. Judge Tighe's section on *Yool* is worth quoting at length:

> On the other hand, the California Court of Appeals in *Estate of Yoo*l, 151 Cal. App. 4th 867 (2007) appeared to limit the strict application of CCP 366.2. Yool dealt with the issue of a resulting trust, an implied trust that comes into existence by operation of law, where property is transferred to someone who pays nothing for it; and then is implied to have held the property for benefit of another person, and the Court was asked whether CCP 366.2 was applicable. The Court focused in on the phrase "liability of the person," or personal liability, and interpreted it to mean "[l]iability for which one is personally accountable and for which a wronged party can seek satisfaction out of the wrongdoer's personal assets." *Id*. at 875 (quoting Black's Law Dict. (8th ed 2004)). In the context of an action to decree a resulting trust or quiet title based on a resulting trust theory, the Court found that the matter adjudicated would concern whether the presumption of a resulting trust arose under the facts. Because the trustee held title, but did not own the property in question, there was no issue of personal liability or resort to the probate's assets. The Court held that a resulting trust arises by operation of law and does not implicate the personal liability of the probate trustee.

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**CONT... Serenity Oak Farms, LLC** **Chapter 7**

The *Yool* Court also reached this conclusion through further analysis on the legislative history of Code of Civil Procedure section 366.2, which makes it clear that the provision pertains to debts, that is, to claims resulting from the relationship between the debtor and the creditor. As the Commission emphasized, the statute of limitations set forth in Code of Civil Procedure former section 353 was "intended to apply in any action on a debt of the decedent … ." Code of Civil Procedure section 366.2 does not apply for another fundamental reason: At the time of Yool's death, nothing had occurred to affect the rights of the beneficiary of the resulting trust. The mere lapse of time, without repudiation, does not affect the beneficiary's rights.

Yool's strict interpretation of the statutory language of CCP 366.2 was subsequently interpreted by the California Court of Appeals in *Sefton v. Sefton,* 206 Cal. App. 4th 875 (2012). In *Sefton*, the Court stated that "the [Yool] Court noted at the time of the decedent's death, there was not yet a cause of action for a resulting trust, and Code of Civil Procedure section 366.2 'specifically contemplates an action that may be brought against a person prior to his or her death." Id. at 893-94. The Plaintiff's cause of action here existed well before the Decedent passed. While the ruling in *Yool* does limit 366.2's strict limitation, *Yool* is not on point because it addresses an action that was not ripe when the decedent passed away. It also appears to be an outlier based on an unusual set of facts.

The Plaintiff's argument is also that CCP 366.2 only applies to actions "brought on a liability of the person" and does not apply to actions brought to recover specific property. This reads *Yool* far too broadly and runs counter to how courts have interpreted this statute and the legislature's intent for drafting the statute in the first place. The purpose of CCP 366.2 is to ensure a speedy and efficient administration of a probate estate. In order to achieve this purpose, the state imposed a statute of limitations of one year for bringing any actions against the estate. The state created a few narrow exceptions to this general rule, enumerated in CCP 366.2 (b), and

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> Courts have been reluctant to go beyond these exceptions. It is uncontested that the exceptions to this statute of limitations are not applicable here and the solo basis for the Trustee's argument rests on Yool. Even though the Trustee in this case is seeking to recover property, and not money damages, the same concerns about quickly and efficiently administering the estate are present.

This court has the greatest respect for Judge Tighe, but the court sees an issue that may not have been fully developed in her discussion distinguishing *Yool.* It is just not that clear (at least not to this court) that "liability of the person" as discussed in §366.2 is quite the same thing as an action under 11 U.S.C. §544(b). Yes, there are authorities discussing liability in this context, but the bankruptcy avoidance action is designed primarily, as the name implies, to avoid transfers of property. Personal liability as in damages is an option under §550(a), of course, but this is only an option "if the court so orders." There are good reasons for the option because in some cases, as is apparently true here, the property and its value is traceable to a specific destination (account) and therefore imposition of personal liability is redundant or unnecessary. So, is this a "liability of the person" of Mrs. Partridge within the meaning of §366.2? (emphasis added). Maybe so, maybe not. Or does its *in rem* overtones dictate a different analysis? The *Yool* court thought the remedy of imposing a resulting trust over target property made this quest into something other than "liability of the person" since it was not really the decedent's property that was in question but the target asset and concerned proper title thereto. *Yool* 151 Cal. App. 4th at 875-76. Of course, we can argue here whether it is truly a resulting trust as Trustee seeks in the complaint, or perhaps instead it is or should be a constructive trust as a remedy, but those distinctions may be, in the end, beside the point. Maybe the point is whether the focus is really on recovering an improperly conveyed asset as opposed to imposing monetary liability.

Can an answer be discerned by studying the purpose or the policy behind CCP §366.2? One year is a relatively short timetable. The *Yool* court also observed, citing the legislative history of §366.2 (or companion 353) and section 9000 et seq. of the Probate Code as explained in C*ollection Bureau of San Jose v. Rumsey*, 24 Cal. 4th 301, 308 (2000), the definition of a "claim" was thought not to include disputes over title to property within the

possession of the decedent. *Yool*, 151 Cal. App. 4th at 872-73. Rather, the short limitation is designed more for the usual case where debts of the decedent owed from the decedent's property is generally well known to a creditor and can be expected to be presented timely. The policy as expressed at several places is for expeditious resolution of decedent estates. But there is a compelling counter purpose/policy for the two years provided at §546. This (and §108 as well) clearly give a trustee adequate time to investigate thoroughly and decide if avoidance actions need be filed; obviously trustees are not always given a road map as to what they have inherited and so a tight and potentially impossibly narrow superseding limitations period such as 366.2 is problematic, to say the least. It is not persuasive to argue that *this trustee* had notice and opportunity of about 18 months because limitations and statutes of repose are not supposed to be fact-dependent, but rather bright line markers.

In deciding whether there is a preemption the court must also confront the so-called 'probate exception.' The Supreme Court explored the probate exception at length in the case of *Marshall v. Marshall*, 547 U.S. 293 (2006). The *Marshall* court began by observing that "[d]ecisions of this Court have recognized a 'probate exception,' kin to the domestic relations exception, to otherwise proper federal jurisdiction." *Id.* at 308. The *Marshall* court then explained, "[i]t is true that a federal court has no jurisdiction to probate a will or administer an estate . . . . But it has been established by a long series of decisions of this Court that federal courts of equity have jurisdiction to entertain suits in favor of creditors, legatees and heirs and other claimants against a decedent's estate to establish their claims' so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." *Id. at 310* (internal citations omitted). The *Marshall* court then explained, quoting key language from its decision in *Markham v. Allen*, 326 U.S. 490 (1946), that the probate exception is actually fairly narrow:

> "while a federal court may not exercise its jurisdiction to disturb or affect the possession of property in the custody of a state court, . . . it may exercise its jurisdiction to adjudicate rights in such property where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is

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**CONT... Serenity Oak Farms, LLC** **Chapter 7**

bound by the judgment to recognize the right adjudicated by the federal court." *Marshall*, 547 U.S. at 310. citing *Markham*, 326 U.S. at 494.

In interpreting the above passage, the *Marshall* court reasoned, "[w]e read *Markham*'s enigmatic words… to proscribe 'disturb[ing] or affect[ing] the possession of property in the custody of a state court.*'" Marshall*, 547 U.S. at 311 citing *Markham*, 326 U.S. at 494. The *Marshall* court further elucidated, "[i]n short, we comprehend the 'interference' language in *Markham* as essentially a reiteration of the general principle that, when one court is exercising *in rem* jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same *res*. *Id.* at 311. The *Marshall* court then concluded, "[t]hus, the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction." *Id. at 311-312.*

The court is not clear at all that the "probate exception" has any application here. First, as the court understands it, the *res* in question here is in continuing possession of the Partridge Trust, not the Probate Court. The trust appears to be a self-effecting entity, indeed a "probate avoidance trust" operating by its own terms and not requiring any Probate Court orders. Moreover, as the court understands it, the Probate court has no role in determining who might be the legitimate creditors of the Partridge trust. If those assumptions are accurate, there is likely no probate exception here, which therefore raises the question of whether the concerns raised in dicta by the *Rund* court of the preemption question over probate matters falls away, which might then be read to embrace the larger holding that §546 does preempt. *Rund*, 523 B.R. at 692.

Another issue is whether Trustee was actively thwarted and hindered from discovering information that would have allowed him to bring the action within the one year. In the FAC, Trustee asserts that the "Debtor and/or the Partridge Trust, among other things, delayed the disclosure of information and documents to Plaintiff; refused to provide certain documents, at all, and

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**CONT... Serenity Oak Farms, LLC** **Chapter 7**

only did so after issuance of process; were instructed not to answer questions that sought information and documents relevant to Plaintiff's investigation; took inconsistent positions as to those authorized to testify and produce information and documents for the Debtor; and did not produce the Partridge Trust instrument until the eve of the expiration of the period set forth by section 546(a) of the Bankruptcy Code." FAC at p. 3-4.

These allegations are pretty general and do not give the court a clear picture of why Trustee, with diligent efforts, could not have discovered the transfers to the Trust within 1 year (plus the additional COVID relief time) of Judith's death. The court also notes that several of the Trustee's causes of action allege intent to defraud creditors on the part of Debtor. It is not as clear whether Trustee alleged intent to defraud against Cassondra and Camden. In any case, it is a basic pleading rule that allegations of fraud require greater particularity pursuant to FRCP 9(b). The FAC does not appear to meet this standard. But it is also not clear whether allegations of fraud as against Debtor, Judith, Cassondra, or Camden would matter. Perhaps such a showing might have some traction on whether to apply equitable tolling. But only a weak showing is made in the FAC. But a Rule 12(b) motion is not an appropriate procedural devise for receiving and evaluating evidence.

*Deny. However, amendments might be in order on alleged fraudulent acts of Camden and Cassondra ,whether the Partridge Trust persists after Judith's death and under these facts should be treated as a "subsequent transferee" within the meaning of §550(a)(2).*

**Party Information**

**Debtor(s):**

| | |
|---|---|
| Serenity Oak Farms, LLC | Represented By<br>William J Wall |

**Defendant(s):**

| | |
|---|---|
| CASSONDRA LOUISE | Represented By<br>Laila Masud<br>D Edward Hays |
| CAMDEN JOHN PARTRIDGE | Represented By |

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**CONT... Serenity Oak Farms, LLC** **Chapter 7**

Laila Masud
D Edward Hays

CASSONDRA LOUISE — Represented By
D Edward Hays
Laila Masud

**Plaintiff(s):**

Jeffrey I. Golden — Represented By
Michael G D'Alba
Eric P Israel

**Trustee(s):**

Jeffrey I Golden (TR) — Represented By
Eric P Israel
Michael G D'Alba

11:00 AM

**8:19-10158 BP Fisher Law Group, LLP** **Chapter 11**

Adv#: 8:19-01064 BP Fisher Law Group, LLP v. Carrington Mortgage Services, LLC

**#8.00** STATUS CONFERENCE RE: Complaint for: (1) Breach Of Contract; (2) Open Book Account; (3) Quantum Meruit

**(con't from 4-07-22 per order approving stip. to cont. s/c & mtn to dismiss adversary proceeding entered 3-17-22)**

Docket 1

***** VACATED *** REASON: CONTINUED TO 8-04-22 AT 11:00 A.M. PER ORDER APPROVING STIPULATION TO CONTINUE STATUS CONFERENCE AND MOTION TO DISMISS ADVERSARY PROCEEDING ENTERED 5-23-22**

**Tentative Ruling:**

- NONE LISTED -

**Party Information**

**Debtor(s):**

| | |
|---|---|
| BP Fisher Law Group, LLP | Represented By<br>Marc C Forsythe |

**Defendant(s):**

| | |
|---|---|
| Carrington Mortgage Services, LLC | Pro Se |

**Plaintiff(s):**

| | |
|---|---|
| BP Fisher Law Group, LLP | Represented By<br>Benjamin Cutchshaw |

# United States Bankruptcy Court
# Central District of California
## Santa Ana
## Theodor Albert, Presiding
## Courtroom 5B Calendar

**Thursday, June 9, 2022** **Hearing Room 5B**

11:00 AM

**8:19-10158 BP Fisher Law Group, LLP** **Chapter 11**

Adv#: 8:19-01064 BP Fisher Law Group, LLP v. Carrington Mortgage Services, LLC

**#9.00** Motion to Dismiss Adversary Proceeding 12(b)(6)
**(con't from 4-07-22 per order approving stip. to cont. s/c & mtn to dismiss adversary proceeding entered 3-17-22)**

Docket 3

***** VACATED *** REASON: CONTINUED TO 8-04-22 AT 11:00 A.M. PER ORDER APPROVING STIPULATION TO CONTINUE STATUS CONFERENCE AND MOTION TO DISMISS ADVERSARY PROCEEDING ENTERED 5-23-22**

**Tentative Ruling:**

- NONE LISTED -

**Party Information**

**Debtor(s):**

| | |
|---|---|
| BP Fisher Law Group, LLP | Represented By<br>Marc C Forsythe |

**Defendant(s):**

| | |
|---|---|
| Carrington Mortgage Services, LLC | Represented By<br>Alexander G Meissner |

**Plaintiff(s):**

| | |
|---|---|
| BP Fisher Law Group, LLP | Represented By<br>Benjamin Cutchshaw |

**Trustee(s):**

| | |
|---|---|
| Richard A Marshack (TR) | Pro Se |

2:00 PM
**8:21-11311 Hilde Van Der Westhuizen** **Chapter 7**
Adv#: 8:21-01059 Anastasia Sky, MD. v. Van Der Westhuizen

**#10.00** CONT'D PRE-TRIAL CONFERENCE RE: Complaint to Determine Nondischargeability of Debt
(Complaint filed 7-29-21)
(PTC set at 10-20-21 Hrg.)
**(cont'd from 4-27-22 Wallace Cal)**
**(cont'd from 4-28-22 per court's own mtn - passing of the gavel)**
**(cont'd from 5-26-22 per court's own mtn to coincide with mtn for summary judgment)**

FR: 10-20-21

Docket 1

**Tentative Ruling:**

Tentative for 6/9/22:
See #11.

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Tentative for May 26, 2022:
Continued to June 9, 2022 at 2:00 p.m. to coincide with motion for summary judgment. Appearance is waived.

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Prior Tentatives:

**APPEARANCES REQUIRED**.

The Court will set the pretrial conference for April 27, 2022 at 10:00 a.m.

COURT TO PREPARE ORDER.

**Party Information**

# United States Bankruptcy Court
# Central District of California
## Santa Ana
## Theodor Albert, Presiding
## Courtroom 5B Calendar

**Thursday, June 9, 2022** **Hearing Room 5B**

2:00 PM

**CONT... Hilde Van Der Westhuizen** **Chapter 7**

**Debtor(s):**

| | |
|---|---|
| Hilde Van Der Westhuizen | Represented By<br>Joseph A Weber |

**Defendant(s):**

| | |
|---|---|
| Hilde Van Der Westhuizen | Pro Se |

**Plaintiff(s):**

| | |
|---|---|
| Anastasia Sky, MD. | Represented By<br>Scott S Weltman |

**Trustee(s):**

| | |
|---|---|
| Karen S Naylor (TR) | Pro Se |

2:00 PM

**8:21-11311 Hilde Van Der Westhuizen** **Chapter 7**

Adv#: 8:21-01059 Anastasia Sky, MD. v. Van Der Westhuizen

**#11.00** Plaintiff's Motion For Summary Judgment
**(cont'd from 5-26-22 per order entered 5-16-22)**

Docket 11

**Tentative Ruling:**

Tentative for 6/9/22:

This is plaintiff, Anastasia Sky's ("Plaintiff") motion for summary judgment against defendant/debtor Hilde Van Der Westhuizen ("Defendant"). Through this motion, Plaintiff seeks to have a judgment debt excepted from discharge under 11 U.S.C. §523(a)(6). Defendant opposes the motion.

1. Background

As far as can be discerned, the following facts are not in seriously disputed (except to the extent that Defendant argues these facts are drawn from documents not judicially noticed or properly authenticated):

In a judgment entered on August 1, 2018 that is now final, the Court of Common Pleas, Stark County, Ohio determined that Defendant committed the following intentional torts and awarded damages to Plaintiff as a result: (a) defamation per se, (b) defamation, (c) violation of the Ohio Deceptive Trade Practices Act and (d) intentional infliction of emotional distress.

In total, the trial court awarded Plaintiff $302,722.56 in damages as follows: $120,000 in compensatory damages, $12,568.00 in punitive damages, $164,584.89 in legal fees and $5,569.67 in other damages. The trial court initially entered a default judgment against Defendant on March 29, 2017, which was opposed vigorously by Defendant. Subsequent to the filing of Plaintiffs Motion for Default Judgment, Defendant, through counsel, filed a Brief in Opposition to Motion for Default, along with a supporting affidavit of Defendant, on March 9, 2017. On March 15, 2017, Defendant filed a Motion for Leave to file a Motion to Dismiss the state court lawsuit for lack of personal jurisdiction. On March 29, 2017, the trial court issued a Judgment granting Plaintiffs Motion for Default Judgment and ruling that Defendant's

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**CONT... Hilde Van Der Westhuizen** **Chapter 7**

Motion for Leave to file a Motion to Dismiss was rendered moot. On April 13, 2017, Defendant filed a Motion to Vacate or Set Aside Default Judgment. The trial court denied Defendant's Motion to Vacate or Set Aside Default Judgment on June 29, 2017.

Subsequently, Defendant appealed the trial court's decision to the Ohio Court of Appeals, which appeal was then dismissed. The trial court then held a series of damages hearings on November 3, 2017, December 13, 2017, February 28, 2018, March 1, 2018, April 5, 2018 and April 6, 2018. Defendant fully participated in the above-referenced damages hearings through counsel, offering her own testimony as well as that of witnesses. Defendant appealed the trial court's damages award to the Ohio Court of Appeals. On May 20, 2019, the Court of Appeals of Ohio, Fifth Appellate District, Stark County affirmed the damages award.

The trial court's specific findings of fact are included with the motion as an exhibit. The lengthy findings of fact and conclusions of law are incorporated herein by reference, but the court will quote from them as it deems appropriate.

2. Summary Judgment Standards

FRBP 7056 makes FRCP 56 applicable in bankruptcy proceedings. FRCP 56(c) provides that judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. FRCP 56(e) provides that supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein, and that sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served forthwith. FRCP 56(e) further provides that when a motion is made and supported as required, an adverse party may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine issue for trial. FRCP 56(f) provides that if the opposing party cannot present facts essential to justify its opposition, the court may refuse the application for judgment or continue the motion as is just.

A party seeking summary judgment bears the initial responsibility of demonstrating the absence of a genuine issue of material fact, and establishing that it is entitled to judgment as a matter of law as to those matters upon which it has the burden of proof. *Celotex Corporation v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986); *British Airways Board v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir. 1978). The opposing party must make an affirmative showing on all matters placed in issue by the motion as to which it has the burden of proof at trial. *Celotex* , 477 U.S. at 324. The substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*,477 U.S. 242, 248,106 S.Ct. 2505, 2510 (1986). A factual dispute is genuine where the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id*. The court must view the evidence presented on the motion in the light most favorable to the opposing party. *Id*. If reasonable minds could differ on the inferences to be drawn from those facts, summary judgment should be denied. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608 (1970).

3. Is Summary Judgment Proper?

As noted, Plaintiff seeks to have the judgment debt held nondischargeable pursuant to 11 U.S.C. §523(a)(6) for Debtor's willful and malicious injury. It is well-established that in order for a claim to be nondischargeable pursuant to 11 U.S.C. §523(a)(6) both willful and malicious injury must be established. *Ormsby v. First Am. Title Co. (In re Ormsby)*, 591 F.3d 1199, 1206 (9th Cir. 2010). The willful injury standard in this Circuit is met "only when the debtor has a subjective motive to inflict injury or when the debtor believes that the injury is substantially certain to result from his own conduct." *Carrillo v. Su (In re Su)*, 290 F.3d 1140, 1142 (9th Cir. 2002). Whereas the malicious injury standard is satisfied by demonstrating that the injury "involves (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse." *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202, 1209 (9th Cir. 2001).

Here, the findings of fact and conclusions of law of the Ohio trial court are sufficient to satisfy the requirements of §523(a)(6). First, the willfulness

standard is clearly met because, as the trial court noted, for example, that just before the winners of the International Best of Breed Champion Award were to be announced, Defendant began to attack and disparage Plaintiff by email to, among others, CFAAnimalWeJfare@aol.com. The trial court noted that this email address belonged to Linda Berg who runs the Cat Fanciers' Association ("CFA") Breeder Assistance and Breeder Rescue Program and is also the CFA's contact for animal welfare issues. (Trial Court Findings of Fact and Conclusions of Law at. p. 4:¶9) The trial court found that "On March 7, 2016, Defendant, using a fake email address, sent a lengthy email to Linda Berg at CFAAnimalWe1fare@aol.com containing numerous falsities about Dr. Sky…" Id. at ¶10. In particular, the court found that Defendant "posing as Dr. Sky's former cattery employees (Mike and Cindy whom she met at Dr. Sky's home in February 2014 and impersonated in this email), communicated numerous false and defamatory statements about Dr. Sky and her treatment of cats, including but not limited to, Dr. Sky engaging in cat hoarding, her cats living in appalling cattery conditions, keeping cats in small wire cages at all times, having more than thirty (30) adult cats in her basement in cages without any natural light or human interaction, and treating her cats cruelly and inhumanely, resulting in "Mike and Cindy" terminating their employment with Dr. Sky." *Id*. Beyond Linda Berg, the trial court also found that Defendant sent this email to others in the cat breeding community…" *Id.* These other recipients included judges of the cat shows. *Id.* The court noted that upon inspection of Plaintiff's cattery, the inspector "observed that the kittens and cats were well cared for, socialized, and had ample space and toys[.]" *Id.* at 11. It should be noted that the trial court found that prior to the disparaging emails sent by Defendant under a false name, Plaintiff had "a strong reputation as both a medical doctor and as a cat breeder and exhibitor[.]" *Id*. at ¶3.

This is just one example of the type of defamatory misconduct the trial court found Defendant liable for. Other examples included impersonating one of Plaintiff's patients to post false and unflattering reviews on a popular doctor rating website, RateMDs.com. *Id.* at pp. 8:¶20 -9:¶25. The trial court found that such false reviews being posted online caused Plaintiff emotional distress, loss of patients, damage to reputation. *Id.* at p. 9:¶26. It would strain credulity to argue that this was not Defendant's intent. Indeed, the trial court found as much in assessing punitive damages:

"[T]he Court finds that Dr. Sky has proven that Defendant acted with actual malice in making false statements about Dr. Sky because the circumstances of the disparagement, including creating various fake identities to deliver the false statements, and the content of the emails themselves demonstrate actual malice. Because the sending of emails under fake names cannot be done accidentally or with mere negligence, Defendant's actions were willful and intentional. Further, the content of the emails and the senders themselves were clone with the intent of causing injury to Dr. Sky. The Court further finds actual malice because the timing of the RateMDs.com reviews and emails coincided with cat show victories for Dr. Sky, and the flurry of defamatory emails sent in the spring of 2016 were sent as Defendant's cat and Dr, Sky's cat were competing for the highest CFA award and was done with the intent of causing Dr. Sky to lose her chance at that award." *Id.* at p. 40.

As should be obvious, these findings by the trial court are sufficient to conclude that not only were Defendant's actions willful, they were also malicious within the meaning of §523(a)(6) because( 1) the acts were clearly wrongful; (2) were certainly done intentionally; (3) necessarily caused harm to Plaintiff as seen in the trial court's damages assessment ; and (4) were done without just cause or excuse, and none is offered now. Thus, a case is clearly made for the judgment debt to be held nondischargeable as it comfortably falls within the ambit of §523(a)(6). But this is only true if Plaintiff's argument for collateral estoppel based on the Ohio state court judgment prevails.

4. Collateral Estoppel

The doctrine of collateral estoppel can be applied to dischargeability actions in bankruptcy. See *Grogan v. Garner*, 498 U.S. 279, 285 at fn. 11 (1991) ("We now clarify that collateral estoppel principles do indeed apply in discharge exception proceedings pursuant to § 523(a)."). In *Cal-Micro, Inc. v. Cantrell*, 329 F.3d 1119, 1123 (9th Cir. 2003), the Ninth Circuit Court of Appeals restated the established rule of law that 28 U.S.C. §1738 requires federal courts to give full faith and credit to a state's collateral estoppel principles. *Gayden v. Nourbakhsh*, 67 F.3d 798, 800 (9th Cir. 1995). See also *Harmon v. Kobrin (In re Harmon)*, 250 F.3d 1240, 1245 (9th Cir. 2001). The

court applies the forum state's law of issue preclusion. *Id*. While Harmon involved California law issue preclusion, the case at bar involves a state court judgment rendered in Ohio.

Under Ohio law, issue preclusion applies when the fact or issue (1) was actually and directly litigated in the prior action, (2) was determined by a court of competent jurisdiction, and (3) when the party against whom issue preclusion is asserted was a party, or is in privity with a party, in the prior action. *Thompson v. Wing* (1994), 70 Ohio St.3d 176, 183, citing *Whitehead v. Gen. Tel. Co.* (1969), 20 Ohio St.2d 108, paragraph two of the syllabus. The party asserting issue preclusion carries the burden of proving a record sufficient to reveal the controlling facts and pinpoint the exact issues litigated in the prior action. *In re Lambert*, 233 Fed. Appx. 598, 600 (9th Cir. 2007). Under Ohio law, a default judgment can be considered actually and directly litigated so long as the default judgment is an "express adjudication" meaning it must contain "express findings." See *In re Simmons*, 2021 WL 4558306 at * 4 (Bankr. N.D. Ohio, Oct. 5, 2021) citing *Sill v. Sweeney (In re Sweeney)*, 276 B.R. 186, 193 (B.A.P. 6th Cir. 2002) . "The state court must also have decided the merits of the case and must show findings of fact and conclusions of law in its decision. Id. (internal quotations omitted). Further, "the default judgment should have sufficient detail to enable a subsequent court to have a clear understanding of the prior court's ruling without having to speculate about the scope of the prior court's findings of fact and conclusions of law." *Id*. citing *Yust v. Henkel (In re Henkel)*, 490 B.R. 759, 781–82 (Bankr. S.D. Ohio 2013) (internal quotations omitted).

Here, Defendant argues that summary judgment based on collateral estoppel should be denied because Plaintiff cannot meet the first element as the Ohio state court judgment was based on a default judgment. Therefore, Defendant argues, the issues were not actually or directly litigated. Instead, Defendant argues, the entire judgment is invalid because Defendant was never properly served, and the court did not have personal jurisdiction as Defendant is not a resident of Ohio and does not have sufficient minimum contacts.

However, Plaintiff correctly points out that the procedural history of this case demonstrates that Defendant asserted defenses such as failed service

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and lack of personal jurisdiction in her failed attempts to have the default judgment set aside and vacated. It is hard to argue that Defendant did not actually litigate this case. Again, the procedural history demonstrates the vigor with which Defendant litigated these claims, but lost at every level, including at the Ohio Court of Appeals where the trial court's decision was affirmed. As noted in the quote above, the trial court, through its lengthy and detailed Findings Of Fact And Conclusions Of Law held that Defendant's misconduct that harmed Plaintiff was done willfully and maliciously despite hearing Defendant's argument and evidence to the contrary. This is clearly not a case of a litigant deciding that a case was not worth defending and who now find themselves looking at a judgment debt being nondischargeable. Quite the contrary. Thus, it is safe to conclude that this case was "actually and directly litigated" satisfying the first element for applying collateral estoppel.

As noted, Defendant's protestation that the trial court lacked personal jurisdiction should be rejected as Defendant raised this argument in Ohio and did not prevail. The Court of Appeals in Ohio observed Defendant's minimum contacts with Ohio, and expressly rejected Defendant's personal jurisdiction argument. The Court of Appeal concluded, "[w]e find that [Defendant] purposefully availed herself of the privilege of conducting business and engaging in activities in Ohio." See Motion, Exhibit C, p. 4. Regarding whether service of the Ohio complaint was valid upon Defendant, the Court of Appeals quoted the trial court's finding of valid and perfected service upon Defendant, and stated the Court of Appeals' agreement. *Id*. Thus, this conclusively establishes the Ohio trial court was a court of competent jurisdiction, which satisfies the second element.

Finally, it is undisputed that parties in this adversary proceeding are identical to those in the Ohio state court case and subsequent appeal, which satisfies the third element.

Thus, for the reasons above, collateral estoppel can be properly applied to this summary judgment motion. Defendant's protestations to the contrary are not persuasive.

5. Other Arguments

Defendant half-heartedly attempts to cast doubt on who committed the

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defamatory misconduct in a vain effort to create a triable issue of material fact. But Defendant's efforts likely run afoul of the summary judgment standards above, and in particular the rule articulated in FRCP 56(e), that general denials by themselves will not create a triable issue of fact and preclude summary judgment.

Defendant also attempts to derail the motion by arguing that the trial court's findings of fact and conclusions of law and the Court of Appeals' opinion affirming the trial court have not been properly authenticated by a request for judicial notice. However, Defendant stops short of suggesting that these attachments are not genuine true and correct copies of what they purport to be, but only that they have not been properly authenticated. In reply, Plaintiff makes an informal request to have the attachments judicially noticed, and the court does not see any reason to deny that request as the court is confident that the attachments are what they purport to be.

Grant.

Appearance: suggested

**Party Information**

**Debtor(s):**

Hilde Van Der Westhuizen — Represented By Joseph A Weber

**Defendant(s):**

Hilde Van Der Westhuizen — Represented By Fritz J Firman

**Plaintiff(s):**

Anastasia Sky, MD. — Represented By Scott S Weltman

**Trustee(s):**

Karen S Naylor (TR) — Represented By Arturo Cisneros

# United States Bankruptcy Court
# Central District of California
## Santa Ana
## Theodor Albert, Presiding
## Courtroom 5B Calendar

**Thursday, June 9, 2022** **Hearing Room 5B**

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**CONT... Hilde Van Der Westhuizen** **Chapter 7**

Nathan F Smith
Christina J Khil